

Felon Disenfranchisement and Democracy in the Late Jim Crow Era

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JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON
DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford University
Press 2006)

I. INTRODUCTION

When the history of American felon disenfranchisement is written, this book and its authors will figure prominently. In 1998, Marc Mauer of The Sentencing Project put the issue on the national agenda by publishing a careful survey of American felon disenfranchisement laws.¹ The research in this book, in part new material and in part revised journal articles, provides fresh insight by bringing quantitative and qualitative social scientific tools to the legal and policy problem. The result is a stinging critique—perhaps “indictment” also fits—of a practice the book persuasively claims is unjustifiable and inconsistent with modern democratic principles.

You do not have to take my word for this work’s persuasiveness. In article form, this work has been an important part of the set of arguments that have convinced governors and legislatures in several states to mitigate their felon disenfranchisement laws in the last few years.² Although the authors are sociologists, the book deals with cases, statutes, and legislative history in a way that the law-trained will find reliable and trustworthy. The target audience clearly goes beyond the academy; in acts of what Professor Manza’s curriculum vitae calls

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¹ See THE SENTENCING PROJECT AND HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (1998), available at <http://www.sentencingproject.org/pdfs/9080.pdf>.

² See RYAN S. KING, THE SENTENCING PROJECT, *A DECADE OF REFORM: FELONY DISENFRANCHISEMENT POLICY IN THE UNITED STATES* (2006), available at http://www.sentencingproject.org/pdfs/FVR_Decade_Reform.pdf. Their work is also cited in the less successful litigation on the felon disenfranchisement issue. See, e.g., *Hayden v. Pataki*, 449 F.3d 305, 356 (2d Cir. 2006) (Parker J., dissenting). Legal scholars also rely on Manza and Uggen. See, e.g., Daniel Katz, *Article I Section 4 of the Constitution, The Voting Rights Act and The Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon Disenfranchisement Jurisprudence?*, 10 U. PA. J.L. & SOC. CHANGE (forthcoming 2007) (discussing the work of Manza and Uggen).

“public sociology,” the authors have taken their research to the public through dozens of editorials, media appearances, and interviews.

At its core, the policy of criminal disenfranchisement is close to uniform: among the fifty states, Maine and Vermont stand alone in refusing to disenfranchise those in prison. Beyond that, states vary widely over whether those on probation or parole are disenfranchised, and whether fines and assessments must be paid in full, even if that means an ex-convict, who typically will have limited employment prospects, may be effectively disenfranchised for life. The most important controversy is about those who have “paid their debt,” those convicted of felonies but who are out, off parole and probation, and have paid all fines and assessments. Florida, Kentucky, and Virginia disenfranchise such persons with felony records for life; about ten other states have some limitation for those who are completely free of correctional control—a waiting period before rights are restored, lifetime disenfranchisement for repeat offenders, or lifetime disenfranchisement for those convicted of certain crimes. Of course, each state decides for itself how it treats a person with a conviction, even an out-of-state conviction, so it is perfectly possible that a person who can vote in New York despite a New York conviction will find herself disenfranchised if she moves to Arizona, or vice-versa.

It might be said that felon disenfranchisement is a folkway rather than a policy; it enjoys remarkably wide acceptance in codes across the country without a well-articulated justification or rationale, particularly for the period after full completion of sentence. The book is designed, I think, to reflect the authors’ conclusion that there is no reasonable justification for the policy; they would like to see “reconsideration of all voting restrictions on disenfranchised felons.” (Manza & Uggen, p. 228.) They believe that “even the disenfranchisement of current inmates is problematic.” (Manza & Uggen, p. 231.)

Felon disenfranchisement lies at the intersection of three distinct areas of law. First, while not regarded as “punishment” for due process purposes, it has a criminal law/sentencing component, as part of the package of sanctions automatically following criminal conviction. Accordingly, like loss of other rights (e.g., to possess a firearm, to obtain or retain public benefits, licenses or educational opportunities, and, for non-citizens, to live in this country), felon disenfranchisement just happens upon conviction.³ No one has to tell a defendant about it before pleading guilty, or to put it another way, before deciding whether it is really smarter to mortgage one’s house and fight the case even though the prosecutor offered a walk-away deal.⁴ (It is the allegedly non-punitive nature of felon disenfranchisement that forecloses its legitimation on the ground that it is

³ See, e.g., AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004), available at http://www.abanet.org/crimjust/standards/collateral_toc.html.

⁴ See, e.g., Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

punishment for crime—if punishment, then the judge must disclose it at the time of the guilty plea.)

The “gotcha” nature of disenfranchisement raises fairness issues. From a sentencing perspective, the institution begs the question of what, exactly, disenfranchisement is supposed to do to advance the goals of the criminal justice system. Rather than being a natural, inevitable feature of any mature system of criminal justice, denying large numbers of citizens with felony convictions the right to vote is virtually unique to the United States. (Manza & Uggen, pp. 38–39, 235.) This question is all the more important given the practical problem of reintegrating an increasing number of individuals who have served time in prison.

Second, felon disenfranchisement is part of race law. The disenfranchisement laws of several of the former Confederate states in particular bear the clear imprint of a purpose to maintain white supremacy. A remarkable example is the candid decision of a unanimous Mississippi Supreme Court which, in *Ratliff v. Beale*,⁵ explained the origins of the Mississippi Constitution of 1890, still in force today:

Our unhappy state had passed in rapid succession from civil war through a period of military occupancy, followed by another, in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power.⁶

To cement its power, the dominant group structured the constitution to ensure permanent white supremacy: “Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race.”⁷ This included employment of felon disenfranchisement: Because the state constitution could not discriminate against African-Americans directly, “the convention discriminated against its characteristics and the offenses to which its weaker members were prone. . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes . . . were not.”⁸

Third, felon disenfranchisement is part of election law and voting rights jurisprudence. Ideally, policies allowing some to vote and others not should be based on legitimate and justifiable reasons. A glance at, for example, the post-Civil War constitutional amendments shows that expanding access to the ballot

⁵ 20 So. 865 (Miss. 1896).

⁶ *Id.* at 867.

⁷ *Id.* at 868.

⁸ *Id.*

was the single most important reason the Constitution-in-being was found to be unsatisfactory: The Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-third, Twenty-fourth and Twenty-sixth Amendments expanded the franchise to new groups, or, in the case of direct election of Senators, the ballot's value. If the unlamented demise of qualifications based on sex, race, and property begins to suggest an underlying principle of universal adult franchise, then the exclusion of a particular group, those with felony convictions, calls for a justification.

The book's ambitious claim is that as criminal justice policy, as race policy, and as electoral policy, felon disenfranchisement is not only unjustifiable, but might well be affirmatively harmful measured against relatively uncontroversial policy goals.

II. CRIMINAL JUSTICE POLICY

Reducing crime is the most important, or one of the most important, goals of the criminal justice system. One of the book's most startling suggestions is the possibility that felon disenfranchisement actually increases crime. The book proposes a link between civic participation in the form of voting and desistance from crime. At one level, this makes perfect sense; those convicted of crimes have transgressed the laws of society; they must "pay their debt" and in so doing restore their place in society. In states allowing those who have paid their debt to vote, it would seem to be a positive sign that an individual demonstrates attachment to the community by performing his or her civic duty at the ballot box as well as in other ways. Someone who has a stake in making the laws, common sense suggests, might be less likely to break them.

The authors test this notion empirically by correlating voting and subsequent criminal behavior. Their data for this conclusion come from the Youth Development Study, a longitudinal examination of 1,010 individuals in St. Paul Minnesota who were in the ninth grade when first surveyed in 1987-88. Participants were surveyed repeatedly over time about their behavior and attitudes. (Manza & Uggen, p. 256.)

For those with criminal records and without, voting reduced future criminal involvement. Of those who voted in 1996, 5.2 per one thousand were arrested, and 4.7 per thousand were incarcerated in 1997-2000; of those who did not vote, the arrest rate was 15.6 per thousand and the incarceration rate 12.4 per thousand. Separating these statistics into those with and without prior criminal records showed the same effect. Of those with prior arrest records, 26.6 per thousand of non-voters were rearrested, while only 12.1 per thousand of voters were rearrested. Of those with no arrest history, 10.1 per thousand of non-voters were arrested, while only 3.5 per thousand of voters were arrested. The correlation between voting and law-abiding behavior held when using self-reports of criminal behavior: Those who voted were much less likely to admit having committed a property or violent crime for which they were not arrested than those who failed to perform their civic duty. (Manza & Uggen, pp. 132-33.)

The authors acknowledge that their data are suggestive rather than conclusive, and, as is characteristic of this book, they identify the potential infirmities of the hypothesis; controlling for other characteristics such as race and sex explains much of the difference of the criminal justice involvement between voters and non-voters. Nevertheless, the potential connection is intriguing and intuitively plausible. Just as, *caeteris paribus*, those who feel like they are part of society may be more likely to follow its rules, individuals who get the message that they are outsiders forever might feel less moral constraint from laws they can never influence.

The data showed that those who had been arrested or incarcerated were less likely to claim affiliation with any political party than those who had never had contact with the criminal justice system; that is, a greater percentage were independent rather than Republican or Democratic. (Manza & Uggen, p. 119.) They were more cynical about government, their own role in influencing public policy, and were less likely to talk politics with friends and family than those who remained free of criminal entanglement. (Manza & Uggen, pp. 120–22.) Rather than criminals tending to be uninterested in politics, the data raise the possibility that political disengagement or exclusion breeds crime. “If those who vote are actually less likely to commit new crimes, extending the franchise may facilitate reintegration efforts and perhaps even improve public safety.” (Manza & Uggen, p. 129.)

Another argument based on criminal justice policy has been that exclusion of convicted persons is necessary to avoid radical, undesirable changes in our criminal laws. Judge Henry Friendly rejected an equal protection challenge to felon disenfranchisement on this basis: “A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.”⁹ There are many possible responses to this concern, the most obvious one being that it is quite unlikely that even the most carefully orchestrated political campaign by people with felony records would lead to repeal of RICO or reduction of the age of consent.

Chapter 6 offers an additional reason why fear of a public policy oriented toward the preferences and interests of criminals is unrealistic, based on the results of a qualitative study consisting of interviews with individuals in prison, on parole, or on probation. There was little support for radical changes to the criminal justice system: “[N]one of our respondents expressed extreme views about eliminating or fundamentally transforming the system. In fact, a number highlighted instead the new knowledge they had gained in prison about just how bad *other* criminals are.” (Manza & Uggen, p. 144.)

⁹ Green v. Bd. of Elections of the City of N.Y., 380 F.2d 445, 451–52 (2d Cir. 1967).

There were also a surprising number of self-described conservatives. Said one:

I was a liberal Democrat most of my life, but due to my problems I have to be conservative 'cause I can't cope with my problems and be liberal ... like when I got drunk and became sexual act-, sexually prone, you know? ... But being, switching to conservatism, now I, you know, I have to be conservative 'cause I- With my medications and stuff, and my mental problems, if—without being conservative, I'll be in trouble. (Manza & Uggen, p. 147.)

Similarly, a prisoner with a murder rap explained: "One thing that would make me lean toward the Republican viewpoint is their, they think that, you know, the government shouldn't have so much money and, you know, shouldn't be as big as it is and have so much power and authority, which all really comes from money, I guess." (Manza & Uggen, p. 149.)

At bottom, "[f]ar from being the politically deviant or incompetent citizens imagined by those who would protect the 'purity' of the ballot box, they expressed the same types of political hopes and fears, and policy preferences, as other enfranchised groups." (Manza & Uggen, p. 151.) "Our interviews also suggested an interaction between the right to vote and the willingness to invest in political knowledge, awareness, or interest, which might stimulate participation in the first place." (Manza & Uggen, p. 157.) "They clearly felt the sting of disenfranchisement and other collateral consequences of their convictions, which marked them as outsiders." (Manza & Uggen, p. 163.)

It is a profound decision to hold that those convicted of crime, even relatively minor crimes a long time ago, can never regain their places as full and equal members of society. As Justice Anthony Kennedy said in his remarkable speech to the American Bar Association in 2003, in which he criticized mass incarceration, mandatory minimum sentences, and the absence of discretion:

To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.¹⁰

III. RACIAL POLICY

A major contention of the book is that felon disenfranchisement is an artifact of Jim Crow. Admittedly, the argument is not simple; Louisiana's 1845 felon

¹⁰ Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), in 16 FED. SENT'G. REP. 126, 127 (2004).

disenfranchisement law, for example, cannot possibly have been designed as a covert measure against African-Americans, because other provisions of law disenfranchised them explicitly. Felon disenfranchisement clearly was not invented as a tool of oppression of African-Americans.

However, traditional legal and historical techniques have generated strong evidence of discriminatory intent in particular states at particular times, most particularly in the former Confederate states. The authors recount some of this history. In *Hunter v. Underwood*,¹¹ for example, a unanimous Supreme Court, in an opinion written by then Associate Justice Rehnquist, invalidated Alabama's felon disenfranchisement provision because it was designed to disenfranchise African-Americans. Other states' disenfranchisement provisions also reflect evidence of intent to disenfranchise African-Americans. "Disenfranchisement based on criminal conviction provided a useful, and potentially permanent, way to eliminate voters, particularly in light of corresponding changes to the criminal justice system (which became both more expansive and more formalized during the mid- to late nineteenth century)." (Manza & Uggen, p. 57.) "In Alabama, for example, nonwhites made up just 2 percent of the prison population in 1850, but 74 percent by 1870." (Manza & Uggen, p. 57.) "John Fielding Burns, sponsor of the new disenfranchisement bill, boasted that 'the crime of wife-beating alone would disqualify sixty percent of the Negroes.'" (Manza & Uggen, p. 58.)

The authors' special contribution here is a quantitative analysis. They demonstrate racial motivation through equations, not anecdotes. Using "event history analysis," they identify the circumstances which led states to adopt a disenfranchisement law in the period 1850 to 2002. They "developed a systematic quantitative analysis that uses detailed information on the social and political makeup of individual states over a long historical period to examine how various factors affect the adoption and extension of state disenfranchisement laws." (Manza & Uggen, pp. 43-44.)

Their conclusion: "Racial threat, as measured by the percentage of nonwhites in state prisons, is clearly associated with adoption [sic] of state felon disenfranchisement laws." (Manza & Uggen, p. 64.) That is, "[w]hen African Americans make up a larger proportion of a state's prison population, that state is significantly more likely to adopt or extend felon disenfranchisement." (Manza & Uggen, p. 67.)

The authors are skeptical of an approach that I happen to love, namely, "legal and doctrinal analyses of court decisions, or [examination of] anecdotal historical evidence." (Manza & Uggen, p. 43.) At least, they do not think these materials tell the whole story. They are right, of course, but the reasons for laws include, centrally, the reasons that can be gleaned from the legislative history and other evidence of legislative motivation, legitimate or not; and the reasons for case law often include those articulated in the court decisions. With laws passed or cases

¹¹ 471 U.S. 222 (1985).

decided in the age of honesty about racism, there is little reason to discount frank, proud, and unambiguous assertions of racial motivation.

Nevertheless, this research is a contribution: Although numbers and correlations are bloodless, and therefore sometimes less appalling and startling than a racist tirade by a Jim Crow-era chief justice or state constitutional convention president, quantitative analysis presents less risk that conclusions could be skewed by unrepresentative but dramatic incidents. In any event, the evidence from traditional legal materials point in the same direction as the authors' statistical analysis: Race drives felon disenfranchisement.

The racial motivation for the laws' enactment is realized in their operation. "[I]n 14 states, more than 1 in 10 African Americans have lost the right to vote by virtue of a felony conviction, and 5 of these states disqualify over 20 percent of the African American voting age population." (Manza & Uggen, p. 79.)

Why not just apply for clemency or restoration of rights? In some jurisdictions, that may be a realistic hope, but in others it is practically impossible. In any event, the book offers empirical evidence that the system is stacked. Another statistical analysis reports on the operation of Florida's process:

African Americans are significantly less likely to have their rights restored, as are those of lower socioeconomic status, those who are not married, and those who do not own their homes. Further, people with a history of mental health treatment are less likely to regain their rights. Differences in criminal history account for some portion of these differences, but do not fully account for the race and class effects on restoration outcomes. (Manza & Uggen, p. 93.)

The authors look to racial politics for an explanation of larger trends in criminal justice. Chapter 4 contends that the rise in imprisonment and prosecution is not explained by increasing rates of crime. "If crime rates cannot account for recent trends in punishment practice, then we must look to political and cultural factors." (Manza & Uggen, p. 105.) The major one: "[T]he reemergence of a sharp link between race and crime." (Manza & Uggen, p. 106.) In addition, the War on Drugs explains why imprisonment has been going up while crime has not. "Twenty years on, it is clear that the campaign has done little to influence actual drug use, but it has been a remarkable political success story." (Manza & Uggen, p. 107.)

The nightly news programs aggressively cover crime stories, exaggerating the problem and feeding public fears. And widespread media depictions of the race of offenders are thus particularly important in the overall story and in magnifying public fears. Although African Americans may commit proportionately more crimes than whites, media coverage vastly exaggerates the extent to which blacks are perpetrators.

A political and cultural model that incorporates race is likely the best explanation for rising levels of criminal punishment in the United States. (Manza & Uggen, p. 109.)

IV. ELECTORAL POLICY

When men wore powdered wigs and knee breeches, felon disenfranchisement was entirely consistent with an elite franchise, restricted as well by race, sex and wealth. Now, however, voting is thought of as a “right” enjoyed by all adults. Felon disenfranchisement still might not be discordant if crime was *crime*: disenfranchising those committing a common law felony might be thought of as almost liberal; rapists, robbers and murderers will always, mercifully, be a small fraction of the population, so disenfranchising them does not raise a significant practical challenge to universal suffrage. Moreover, for crimes that until recently carried a sentence of death,¹² a term of years plus disenfranchisement is not necessarily draconian. But people are disenfranchised for minor felonies as well as grave ones, and business in the felony courts has been brisk. Disenfranchising a substantial portion of the population for relatively trivial offenses is potentially inconsistent with the idea of representative government.

Chapter 3 attempts to calculate the number of those disenfranchised because of criminal conviction. The very exercise is a stark reminder of the ad hoc and diverse nature of America’s electoral system. The book cannot merely pass along information about the number of citizens ineligible to vote, from some government source or collection of sources, because official statistics are not maintained, anywhere, apparently.

The book recounts familiar yet still sobering statistics: In 2002, almost a third of criminal convictions were for drug offenses; less than a fifth for violent crimes. Eight percent involved rape, robbery or murder. (Manza & Uggen, p. 70.) In 1972, fewer than 200,000 people were in prison in the country and the rate of incarceration was 94 per 100,000; in that year, the problem of felon disenfranchisement could, whatever its merits, plausibly have been regarded as *de minimis* in the context of the electorate as a whole. (Manza & Uggen, p. 71.) By 2006, over 2,000,000 were in custody, for a rate of 714 per 100,000. Of course, these numbers are “highly concentrated among some subgroups.” (Manza & Uggen, p. 71.) But to find the total number of disenfranchised individuals, one cannot just add up the number of felony dispositions per year, because not all of those convictions will be disenfranchising under the particular terms of that state’s law, some of those individuals will already have disqualifying convictions, others will have died after conviction and thus no longer be counted among the

¹² *Brookman v. Commonwealth*, 145 S.E. 358 (Va. 1928) (affirming death sentence for common law robbery); *Boston & Worcester R.R. Corp. v. Dana*, 67 Mass. 83, 97 (1854) (“By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown.”).

disenfranchised, and others will move to states where their conviction is not disenfranchising or will be granted clemency or have their rights restored.

With appropriate legal and factual adjustments, the book concludes that on Election Day 2004, 5.3 million Americans were disenfranchised because of a criminal conviction, namely, 2.5% of the voting age population. (Manza & Uggen, p. 76.) Of these, 26% were in prison, and the largest group, 39%, had completed incarceration, probation and parole. (Manza & Uggen, p. 77.)

If Americans as a whole are relatively apathetic about politics, one would expect that the economically disadvantaged, minorities, and those with criminal records would be even less likely to see casting a ballot as a fruitful expenditure of time and money. Accordingly, conceivably the whole felon disenfranchisement controversy is much ado about nothing: Even if allowed to vote, they would not, and therefore, there is no practical import to the issue. Of course, in that event, no harm could possibly come from allowing the few who wanted to vote to do so.

Chapter 7 attempts to calculate how many disenfranchised citizens would vote if the law allowed. Chapter 8 looks at the effect of the current regime on important elections over the past twenty years. “Compared with other postindustrial democratic countries, turnout rates in U.S. national elections are shockingly low.” (Manza & Uggen, p. 115.) Accordingly, the question is not why participation rates are low among those with convictions but who are legally permitted to vote, but rather why are they lower than the low rate at which persons without criminal records vote.

Estimating voter turnout under counterfactual conditions is tricky. It begins with an estimate, state by state, of disenfranchised individuals. The book then attempts to identify the voter turnout in populations matched for all demographic characteristics, except for the right to vote. Although the book concludes that the felon turnout would be lower than that in the general population, it would be substantial: 35% of convicted persons might vote in presidential elections compared to an average of 52% of the population as a whole; and 24% in midterm elections, compared to 38% of the population as a whole. (Manza & Uggen, pp. 170–73.) These estimates do not control for criminal conviction per se, and therefore leave open the possibility that people who commit crimes, independently of other circumstances, might be less likely to vote. However, analysis of the Minnesota Youth Development Study dataset suggests that conviction independent of demographic characteristics does not reduce turnout. (Manza & Uggen, pp. 174–76.)

If the numbers of disenfranchised citizens are large, they partially or completely answer a major conundrum of modern American politics, namely, the declining participation rate: “Between 1960 and 1988, official turnout figures in national elections fell from 62.8 percent to 50.3 percent.” (Manza & Uggen, p. 176.) If those millions who are ineligible to vote are removed from the calculation, apparently dismal rates of turnout do not look so bad; that is, felon disenfranchisement explains a significant portion—some researchers claim all—of the modern decrease in voter turnout.

Chapter 8's conclusions about the electoral consequences of disenfranchisement received national attention when published in article form. Using state-by-state estimates of the disenfranchised population, plus estimated voter turnout, the authors examined how a series of modern elections would have been affected had the laws been different. First, if current rates of disenfranchisement prevailed in liberal 1960, Nixon would have won the popular vote over Kennedy; Carter also would have been in trouble in 1976. (Manza & Uggen, pp. 192–93.) By contrast, if people with criminal records were allowed to vote after completion of their sentence, Al Gore would have won in 2000 in Florida. (Manza & Uggen, p. 192.) The trend here is apparent: “Many convicted felons come from poor or working-class urban districts, with low incomes, few job prospects, and low levels of formal education. The combination of these factors tends to push the ‘average’ felon toward the Democratic Party in any given electoral contest.” (Manza & Uggen, p. 183.) Seven close senate elections since 1978 and four gubernatorial elections might have gone from Republican to Democratic in the absence of disenfranchisement of those out of prison. (Manza & Uggen, pp. 195–97.)

There is some tension between the contention in Chapter 8 that in American's polarized political climate where the margin of error decides many major elections the felon vote would often change the outcome, and the argument in Chapter 6 that the hopes, dreams and political views of those with felony convictions are not so different than those of other Americans. If Chapter 8 is right, then felon votes are not merely a reflection of the votes of those without criminal records; the felon vote skews left. But if we accept the premise that votes for the progressive candidate are not for that reason illegitimate, then the nature of the problem becomes clearer. Felon disenfranchisement results not only in the dignitary harm suffered by the person convicted. The injury is not to those favoring legalization of hard drugs, or to NAMBLA, or other groups in hopeless, permanent minority status holding perverse and anti-social views. The political harm is to those who are a bit on the liberal side on such things as taxation and public support for education, who might well have a stable working majority if African-Americans wound up voting in elections at the same rates as whites. From a democratic perspective, in a system attempting to create a government based on the will of the people, the naked fact that a policy favors one party over another is a reason to reject it, not a justification for it.

Chapter 9 explores public attitudes toward felon disenfranchisement. In 2002, the authors had Harris Interactive include a series of questions about felon voting in a telephone survey. Individuals in the mainland United States were called randomly and asked their views. In order to ensure that the views received were actual views, in addition to offering a “not sure/don't know” choice, they included “I haven't thought much about this” as a possible answer. (Manza & Uggen, p. 213.)

The survey found that only 31% of respondents supported allowing prisoners to vote, but 60% or more supported allowing probationers or parolees to vote.

(Manza & Uggen, p. 215.) When asked about allowing a generic “ex-felon” to vote, 80% supported enfranchisement, but when they were asked about those who committed specific crimes, support went down. However, even for those who committed sex crimes, 52% of those surveyed supported enfranchisement. (Manza & Uggen, p. 216.)

V. CONCLUSION

Felon disenfranchisement makes little sense as a matter of criminal justice policy, as a matter of electoral policy, and has a tarnished history as a tool of Jim Crow. According to the survey evidence, most Americans do not support it. How, then, can its persistence be explained?

One answer is that it can’t survive. Felon disenfranchisement is under serious political pressure. Several legislatures and governors have acted to liberalize their prohibitions in recent years or made it easier to get rights restored. Among the major changes: Since The Sentencing Project started its work in this area, Delaware, Iowa, Nebraska and New Mexico repealed lifetime voting bans, and Maryland, Nevada, Rhode Island and Wyoming provided for automatic restoration of rights for some offenders.¹³ Also during this period, Utah and Massachusetts disenfranchised those in prison.¹⁴ So the nation may be heading toward a public policy consistent with what the survey evidence suggested the public wants—no voting by prisoners, but voting by all citizens who are out of prison.

The work in this book is original and persuasive, but in some respects, admittedly inconclusive. More research, for example, on the connection between the opportunity to vote and future offending would be welcome and help definitively answer a conclusion that in this book is advanced tentatively. But one thing is clear from the enormous, decades-long natural empirical test of the effects of doing without felon disenfranchisement. For years, states as diverse as Hawaii, Idaho, Indiana, Michigan, Oregon, Pennsylvania, Utah, and Vermont have allowed persons to vote, at least once out of prison. In none of them, contrary to Judge Friendly’s fears, have candidates for district attorney or judgeships been elected based on a platform of support for the Mafia. It seems clear that no harm can come to the state from allowing persons with criminal records to vote; perhaps some good can.

¹³ KING, *supra* note 2, at 3.

¹⁴ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2007), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cfd_bs_fdlawsinus.pdf.